No. 89-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEIST PUBLICATIONS, INC.,

Petitioner,

v.

RURAL TELEPHONE SERVICE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF UNITED STATES TELEPHONE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RURAL TELEPHONE SERVICE COMPANY, INC.

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QUESTION PRESENTED

Whether the Copyright Act of 1976 affords lesser protection to telephone directories published by telephone companies than it affords to other compilations.

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The United States Telephone Association respectfully submits the attached brief as *amicus curiae* in support of Respondent Rural Telephone Service Company, Inc. ("Rural").[1]

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[1] This brief is submitted on consent of the parties. The written consents of Petitioner and Respondent have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The United States Telephone Association ("USTA") is the principal trade association of local telephone companies in the United States. It was established in 1897. Local telephone companies, sometimes called exchange carriers, are the primary providers of local telecommunication services in most parts of the United States.

USTA's membership includes nearly 1100 of the nation's approximately 1350 local telephone companies. The membership is comprised of companies of varying size. Some of its members are large telephone companies such as the seven Bell operating companies. The majority are small companies that provide fewer than 10,000 lines.[2] The interest of USTA in this proceeding is the interest of these diverse local telephone companies.

Telephone directories serve as a means by which use of the telephone is facilitated. Callers value a listing as a unique item: the combination of name, address and number. In addition to the familiar "white pages" telephone directory, local telephone companies compile and publish directories of many kinds, such as directories intended specifically for cellular telephone users, directories targeted at business users, and even multi-state directories available on compact disk. Telephone directories are also published by companies that are not local telephone companies, including other carriers. Some of these directories are for numbers not included in local directories. There is an 800 number directory, for example, and there

[2] *PhoneFacts For the Year 1989*, United States Telephone Association.

are directories published by corporations and government entities that include numbers not published in local telephone directories.

Changes in technology promise continuing development in the ways in which local telephone companies can publish directories or otherwise make listing information available to the public. For example, there is no technological impediment to the development of computer-accessible telephone directories which would be indistinguishable from other data bases currently afforded copyright protection. Local telephone companies have already begun to develop and offer such directories.

USTA's interest in this proceeding is to demonstrate that there is no basis for creating a judicial exception to statutory copyright protection for telephone directories. There is no reason to dilute the copyright protection of a directory merely because it is published by a local telephone company. The purpose of this brief is to demonstrate that the Copyright Act provides the same protection to telephone directories that it provides to every other compilation.

SUMMARY OF ARGUMENT

Telephone directories come within the term "compilation" as used in the Copyright Act. In every case in which the issue has been presented, the court has decided that telephone directories are copyrightable as compilations. There is nothing in the Copyright Act of 1976 or in its legislative history which indicates that Congress intended to afford telephone directories a lesser scope of protec-

tion than any other type of compilation. Indeed, where Congress wished to exclude works from copyright protection, it did so by specific reference. Thus, it is improper to exclude telephone directories from copyright protection where the directories meet the definition of a compilation as set forth in the Copyright Act. This is the case even if these directories are required to be published by state law or regulation.

Copyright protection must continue to be extended to compilations which include mundane or ordinary facts. Directories of this type serve vital public functions and purposes by bringing such facts together in a useful organized manner. Should copyright protection be denied to such compilations, including telephone directories, the incentive to produce such useful tools will be lost and the public will be deprived of the benefits of such compilations.

ARGUMENT

A. Telephone Directories Are Original Works Of Authorship Entitled To Copyright Protection.

This case is controlled by the Copyright Act of 1976, 17 U.S.C. §101 *et seq.* ("Copyright Act" or "Act"). The purpose of the Act is to promote the public welfare by providing incentives for the creation and distribution of original works of authorship. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'").

Under the Act, "[c]opyright protection subsists . . . in original works of authorship . . . ." *Id.* at §102(a). Works of authorship are defined to include "literary works" (*id.* at §102(a)(1)) such as compilations. The definition of "compilation" in turn clearly encompasses directories such as those published by local telephone companies within the protection of the Copyright Act. Under the Act, a "compilation" is defined as:

> a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

17 U.S.C. §101.

As noted by Professor Nimmer, "[t]he definition of 'literary works' [under the Act] . . . is broad enough to include catalogs and directories, and this was, indeed, the legislative intent. Catalogs and directories constitute 'compilations' as that term is defined in the Copyright Act." 1 *Nimmer on Copyright* §2.04[B] at 2-40 - 2-41 (1990). *See also Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 809 (11th Cir. 1985) ("Directories are also included within the definition of a 'compilation.'"); *National Research Bureau, Inc. v. Kucker*, 481 F. Supp. 612 (S.D.N.Y. 1979) (shopping center directory); *American Code Co. v. Bensinger*, 282 F. 829 (2d Cir. 1922) (copyright in code book); *No-Leak-O Piston Co. v. Norris*, 277 F. 951 (4th Cir. 1921) (list of piston ring sizes); H.R. Rep. No. 1476, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5667 ("The term 'literary works' does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data.").

Courts have uniformly held that a telephone directory is an "original work of authorship" and is therefore copyrightable. Telephone directories satisfy this standard because they are created by selecting, coordinating and arranging previously collected and assembled data. *See, e.g., Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 485 (9th Cir. 1937) (because the creation of a telephone directory involves "collection, editing, compilation, classification, arrangement, [and] preparation" of material, "[s]aid directories constitute new and original literary works, and are the proper subject of copyright"); *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421, 438 (4th Cir. 1986) (telephone directories cited as examples of originality in the arrangement or selection of facts); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 809 (11th Cir. 1985) ("A telephone directory or any other compilation satisfies the 'original work of authorship' requirement of section 102 where the directory is the product of subjective 'selection, organization, and arrangement of the pre-existing materials.'").

Although telephone directories contain facts which are not themselves copyrightable, courts have agreed that directories are original works which are entitled to protection from wholesale duplication for profit. *See, e.g., Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1085 (7th Cir. 1990) (where public utility compiles alphabetical listing of customers' names followed by street and telephone number, such a compilation is copyrightable because it reflects originality), *petition for cert. filed*, 59 U.S.L.W. 3374 (U.S. Nov. 2 1990) (No. 90-731); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131 (8th Cir. 1985) ("As to originality, where a telephone directory is assembled from data collected and constantly revised by the telephone company, courts consistently have

held that such a directory is copyrightable. It is evident that a directory compiled by a telephone company *from its internally maintained records* may be said to be independently created." (emphasis added) (citation omitted)). *See also Konor Enter., Inc. v. Eagle Publications, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989) (white and yellow pages); *United Tel. Co. v. Johnson Publishing Co.*, 855 F.2d 604, 606 (8th Cir. 1988) (white pages); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985) (yellow pages); *Farmers Independent Tel. Co. v. Thorman*, 648 F. Supp. 457, 459-61 (W.D. Wis. 1986) (white and yellow pages copyrightable though infringement not proved); *Central Tel. Co. v. Johnson Publishing Co.*, 526 F. Supp. 838, 843-44 (D. Colo. 1981) (white pages); *Northwestern Bell Tel. Co. v. Bedco of Minnesota, Inc.*, 501 F. Supp. 299, 301 (D. Minn. 1980) (yellow pages).

B. A Telephone Directory Is Not Entitled To Lesser Protection Than Other Compilations.

In addition to telephone directories, courts have held that other types of collections of facts qualify as compilations and are entitled to protection under the Copyright Act. These include catalogs, *e.g., R.R. Donnelley & Sons Co. v. Haber*, 43 F. Supp. 456 (E.D.N.Y. 1942), credit rating lists, *e.g., Cravens v. Retail Credit Men's Ass'n.*, 26 F.2d 833 (M.D. Tenn. 1924), and industry information directories, *e.g., Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977). There is nothing in the Copyright Act to suggest that a compilation's copyright protection is dependent upon the type of compilation it is, or that different rules should apply depending on the type of compilation. To articulate such a rule would constitute a judicial amendment of the Act, a power not conferred on the courts or justified by the circumstances.

Petitioner, Feist Publications, Inc. ("Feist"), and certain *amici* suggest that telephone directories are entitled to lesser protection under the Act because most telephone companies are required by state law to publish a directory. Brief for Petitioner at 22-23; Brief for ADAPSO at 11; Brief for Haines and Co. at 11. There is no support for that suggestion. While the Copyright Act contains certain narrow exceptions in its protection of original works of authorship (*see, e.g.*, 17 U.S.C. §105 (no copyright for U.S. government or works of its employees in the course of their official duties)), the exceptions do not include compilations such as telephone directories. *See Hutchinson*, 770 F.2d at 132 (white pages directory copyrightable despite state law requirement that telephone company publish such directory). As this Court confirmed, an official state reporter of court decisions, who was required by statute to publish such decisions, owned the copyright in his compilation of such decisions. *Callaghan v. Myers*, 128 U.S. 617, 647 (1888).

Courts have refused the invitation to create exceptions to the Copyright Act. "Where Congress has enacted a clear and comprehensive statute pursuant to a broad constitutional grant of power, as it has here, it is not for the courts to undermine legislative intent by carving out exceptions that Congress did not choose to make." *Hutchinson*, 770 F.2d at 132, *relying on Commissioner of Internal Revenue v. Gordon*, 391 U.S. 83, 93 (1968); *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1225 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) (in the absence of a *per se* rule excluding copyright protection to case arrangements, "the arrangement must be evaluated in light of the originality and intellectual-creation standards."). A state law requirement that a telephone company publish a directory cannot deprive the directory of copyright protection absent clear legislative intent.

C. The Copyright Act Protects the Industrious Collection, Selection and Arrangement of Facts In Works Such As Telephone Directories.

It is argued that some courts of appeal, in contravention of the Act, do not require originality of expression in the selection or arrangement of data as a condition to providing copyright protection for a compilation. *See* Brief for Petitioner at 16; Brief for North American Directory Publishers ("NADP") at 12. It is further argued that to grant copyright protection to a fact compilation such as a telephone directory both destroys the distinction between unprotected fact and protected expression, *see* Brief for Haines and Co. at 8, and improperly protects a purely functional expression of fact, *see* Brief for NADP at 11-12. These arguments ignore the originality of expression reflected in a telephone directory.

Contrary to Feist's contention, the courts have not recently weakened the protection under the Act accorded compilations which reflect the industrious collection and arrangement of facts. *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985); *Eckes v. Card Prices Update*, 736 F.2d 859 (2d. Cir. 1984). The courts' continuing protection of compilations of fact demonstrates both a consistent application of the Act, and a recognition that the policies which underlie the Act require copyright protection for the work product which a compiler creates through skillful effort.

From a policy viewpoint, the need to provide copyright protection for compilations, particularly compilations of

what some might describe as mundane factual data, is stronger than ever. Access to organized factual information presumably permits a user with a need for such information to obtain and use it more efficiently than if the user had to search for the information among diverse sources. A simple example is the guide which contains the public domain schedule of flights to and from North American cities. A person who wants to plan air travel can do so much more efficiently by consulting the published guide which reflects all flights than by calling each airline to determine whether and if so when a particular airline has a flight to a particular city. A competitor with access to the guide can copy and publish it for profit. If the first compiler of such a guide were unable to protect it under the Act from competitors who copied the guide and sold it competitively, the first compiler would likely have little incentive to continue publication of a complete and accurate guide. As a result, the public would be deprived of a useful and accurate compilation of data.

An airline guide is but a single example of the many compilations of information which make daily life more efficient. *See* Brief for ADAPSO at 8-9. If the Copyright Act did not assure the authors of such compilations the right to exploit their works in the marketplace, the incentive to create and publish such works would evaporate. *See id.* at 20-21. Thus, the attack by Feist on well-settled and well-reasoned authority which recognizes why compilations of information qualify for copyright protection is without merit.

While "[t]he copyrightability of factual compilations . . . presents intellectual difficulties in determining where protectable copying of facts ends and unlawful copying of the compilation begins," *Rand McNally & Co. v. Fleet Management Systems*, 634 F. Supp. 604, 608 (N.D. Ill. 1986),

a telephone directory is a work which easily qualifies as a protectable compilation of fact. Rural's and other telephone companies' directories are compiled through the use of judgment in the generation, selection, coordination and arrangement of facts. For example, a telephone company must regularly alter each edition of its directories to add new subscribers, delete subscribers who terminate service and exclude subscribers with "unlisted" numbers. It also may include original fictitious listings to help identify copying. A telephone company must often also decide what geographic areas its directories will cover. A telephone company must also select an appropriate typeface and size of listings, and decide on features that assist the user, such as the recently adopted practice of using surnames as subheadings in the directory. The collection, selection and arrangement of facts for a telephone directory, some of which (the subscribers' telephone numbers) are contributed by the telephone company, require skillful attention to a myriad of details. Thus, such directories are clearly as eligible for copyright protection as other directories. *Compare Hutchinson Tel. Co.*, 770 F.2d at 132; *Rand McNally & Co.*, 634 F. Supp. at 607 (finding that mileage guides are copyrightable where the "collection of numerous maps and the arrangement of data from those maps into tables and segmented maps involves a 'new arrangement or presentation of facts'"); *Eckes v. Card Prices Update*, 736 F. 2d at 863 (plaintiff's list of 5,000 "premium" baseball cards chosen from 18,000 cards involved "selection, creativity and judgment" and was, therefore, copyrightable.).

The case law cited by Feist as rejecting the so-called "sweat of the brow" doctrine provides no rationale for denying copyright protection to a telephone directory. In *Financial Information v. Moody's Investors Serv.*, 808

F.2d 204 (2d Cir. 1986), defendant's non-infringing copying of plaintiff's Daily Bond Cards involved duplication of five basic facts which plaintiff itself had copied from other published "tombstone" announcements. In *Worth v. Selchow & Righter Co.*, 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988), defendant's publication and marketing of a trivia encyclopedia involved merely reorganizing the factual questions and answers included in a popular game. In *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), the court permitted a television film to be based on facts contained in a book about a famous kidnapping. In *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485 (9th Cir. 1985), plaintiff's catalog of radiator parts had been published without complying with copyright requirements, was limited in scope, was itself created from easily accessible facts and reflected a limited means of expressing the data. Telephone directories, unlike the works involved in the above cases, embody the industrious and skillful collection of facts, the selection of certain of those facts for publication and the arrangement of those facts in a logical manner.

Moreover, there is nothing in the Act that suggests that Congress intended to alter the settled rule that no use of a copyrighted directory by a second compiler is lawful, other than as a check after the second compiler has undertaken an independent canvass for the purpose of preparing his own directory. Indeed, the Seventh Circuit recently succinctly summarized the legality of this practice as follows:

> All concede, as Learned Hand said in *Jewelers' Circular, supra*, 274 F. at 935, that 'a second compiler may check back his independent work upon the original compilation.' * * * The second compiler must assemble the material as if there had never been a first compilation; only then may the second compiler use the first as a check on error.

Rockford Map, 768 F.2d at 149.

No public policy is served by departing from this rule. A competing directory publisher should not be allowed to use another's directory for profit by simply copying it without performing the independent work required by the Act. Indeed, the implication that it is permissible for a second compiler to avoid the labor necessary to obtain the data under the guise of checking the first compiler's work will provide a substantial disincentive to the publication of many useful and necessary directories.

Finally, an alphabetical telephone directory is not a form of expression which is dictated by functional necessity. The principle announced in *Baker v. Selden*, 101 U.S. 99 (1879) (expression of a bookkeeping system not protected because the expression was inseparable from the idea) is inapplicable. Rather, while the alphabetical arrangement of the names of telephone subscribers is useful, such arrangement is not absolutely dictated by function. *See, e.g., Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 905 F.2d 1081 (directories published under "criss-cross" system listing streets in alphabetical order, with street addresses in ascending numerical order, and telephone number adjacent to address, infringed plaintiff's alphabetical directory); *Leon*, 91 F.2d 484 (numerical directory infringed plaintiff's alphabetical directory).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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